

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Denise E. Blanks,
Complainant,

Vs

RULING REGARDING-COMPLAINANT'S
MOTION FOR ATTORNEY'S FEES AND

COSTS
Crystal Foods, Inc.,
Respondent.

This matter is pending before the undersigned Administrative Law Judge pursuant to the Complainant's motion for attorney's fees and costs related to the filing of a Motion to Compel. Jeffrey H. Olson, Attorney at Law, Harvey, Thorfinnson & Lucas, P.A., 6640 Shady Oak Road, Eden Prairie, Minnesota 55344, appeared on behalf of the Complainant. Trevor R. Walsten, Attorney at Law, Maun & Simon, 2900 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota 55402-4133, appeared on behalf of the Respondent. The record with respect to the motion closed on January 19, 1993, upon receipt of the Respondent's memorandum in opposition to the motion.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the Memorandum below, IT IS HEREBY ORDERED that the motion is DENIED.

Dated this 18th day of February, 1993

BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

On September 15, 1992, the Complainant served the Respondent by mail with a demand for discovery of witnesses and statements and a set of interrogatories and document requests. On October 15, 1992, the Respondent personally served upon the Complainant a response to the demand for discovery of witnesses and statements. On October 23, 1992, in accordance with an

extension granted by the Complainant, the Respondent served the Complainant by mail and by telefax with responses to the interrogatories and document requests.

In its response to Interrogatory No. 2 (which seeks certain information and documents relating to the compensation provided the Complainant and seven other employees), the Respondent objected to the interrogatory as being overly

broad, unduly burdensome, expensive, harassing and oppressive; irrelevant (with respect to the information sought regarding Alan Andrews); and unreasonably cumulative or duplicative of other discovery (with respect to the information sought regarding Denise Blanks, Jeffrey Robinson and Michael Johnson). The Respondent further indicated that it had not yet conducted full discovery concerning the compensation of three of the employees identified in the interrogatory, noted that its investigation was continuing, and reserved the right to supplement or amend its response. In its response to Document Request No. 2 (which seeks an identification of all documents Respondent intends to use at the hearing as evidence or for other purposes), the Respondent objected to the request as being overly broad, unduly burdensome, expensive, harassing and oppressive; irrelevant (with respect to documents intended to be used "for other purposes"); and premature. The Respondent indicated that it had not yet conducted full discovery, was not in a position to provide a full response, and was continuing its investigation. Notwithstanding these specific objections and subject to attorney-client privilege and the work product doctrine, the Respondent agreed to produce the documents for inspection in their original-files as they are kept in the usual course of business.

The Respondent made a number of documents available for the Complainant's review on October 28, 1992, including employment records pertaining to the Complainant, Gary Bales, Michael Johnson, Jeff Robertson, Christopher Johnson, Pat Hyduke, Richard Korbel, Jim Healy, and Michelle Chez. Prior to the inspection, counsel for the Complainant was informed of the extensive number of documents which would be available for his inspection. The inspection was then cancelled based upon the agreement of the parties that counsel for Respondent would inspect the documents and provide to the Complainant within a reasonable period of time only those which were responsive to the discovery requests.

The Complainant filed a Motion to Compel on November 3, 1992, in which she asserted that full and complete responses had not been supplied to Interrogatory No. 2 and Document Request No. 2, requested that the discovery deadline be extended to December 4, 1992, and asked that attorney's fees and costs be assessed against the Respondent. The Respondent did not file a response to the motion. On November 20, 1992, however, the Respondent personally served supplemental responses to Complainant's interrogatories and produced documents responsive to the interrogatories and requests for production. In its supplemental answer to Interrogatory No. 2, the Respondent provided a chart setting forth compensation and benefit information for seven of the eight employees named in the interrogatory as well as two other employees. The Respondent apparently continues to object to the provision of

information regarding Alan Andrews. Seventy-two pages of documents relating to these employees were produced by Respondent on November 20, including change in payroll forms, interoffice memoranda, handwritten notes, invoices, statements, and W-2 wage and tax statements for calendar years 1988-1991.

In telephone conversations in early December, counsel for the Respondent notified the Administrative Law Judge that the Complainant's Motion to Compel was probably moot as a result of the supplemental responses served by the Respondent, and counsel for the Complainant indicated that he would inform the Administrative Law Judge whether he wished to withdraw the Motion to Compel

after he reviewed the additional information supplied by the Respondent. The Complainant subsequently notified the Administrative Law Judge that, while certain portions of the Motion to Compel were either moot due to the entry of a new scheduling order or not properly considered at this time, the request in the motion for attorney's fees and costs should be addressed. The Respondent filed a memorandum in opposition to an award of fees or costs on January 19, 1993.

The rules of the Office of Administrative Hearings provide that attorney's fees or other sanctions may be awarded in contested case proceedings involving allegations of discrimination where the Administrative Law Judge determines that a party has been intentionally and frivolously delaying the proceedings. Minn. Rules pt. 1400.7050, subp. 2 (1992). "Intentional and frivolous delay" is deemed to occur "when a party deliberately delays proceedings for immaterial, meritless, trivial, or unjustifiable reasons." Minn. Rules pt. 1400.7050, subp. 1.E. (1992). In determining whether such intentional and frivolous delay has occurred, the Judge is to "give consideration to the number of issues and amount of damages in controversy, any pattern of similar acts by the party, and effects of the delay." II. The rules of the Office of Administrative Hearings further provide that, in ruling on motions, the Judge is to apply the Rules of Civil Procedure for the District Court of Minnesota in instances where the rules of the Office of Administrative Hearings are silent and it is determined appropriate to promote a fair and expeditious proceeding. Minn. Rules pt. 1400.6600 (1992). Rule 37.01 of the Rules of Civil Procedure states that reasonable expenses incurred in obtaining an order compelling discovery, including attorney's fees, shall be awarded "unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."

The Administrative Law Judge is not persuaded that an award of attorney's fees or costs is warranted under the circumstances in the present case. While the Respondent's original response to Interrogatory No. 2 was limited in scope and did not formally indicate that further information regarding each of the individuals would be provided, the Respondent apparently afforded the Complainant an opportunity to review records relating to all but Alan Andrews on October 28, prior to the filing of the Motion to Compel. */ It appears that most or all of the information involved in the motion to compel was not received by the Complainant prior to November 20 because the Complainant was unwilling to review voluminous records on October 28. Rule 33.03 of the Rules of Civil Procedure permits a party to afford the opposing party an opportunity to examine records in order to ascertain the answer to an interrogatory where the burden of ascertaining the answer would be substantially the same for each

party, and Rule 34.02 permits a party to produce documents as they are kept in the usual course of business. The Complainant has not alleged that the Respondent's provision of such records for inspection on October 28 was inappropriate in any way. Moreover, the Complainant apparently agreed that

The propriety of the Respondent's objection to the provision of information relating to Mr. Andrews has not been challenged by the Complainant and thus is not properly before the Administrative Law Judge.

the Respondent could conduct a review of the records and provide pertinent information within a reasonable time. There is no evidence of a pattern of delay by the Respondent and, without further supporting facts, the Judge cannot conclude that the 23-day period taken by the Respondent to review the records and provide the information is unreasonable or had a deleterious effect on the Complainant. Under these circumstances, there is insufficient evidence of intentional or frivolous delay by the Respondent and it would be inappropriate to award fees or costs associated with the filing of the motion to compel.

B.L.N.